

AMENDING THE TRADING WITH THE
ENEMY ACT

HEARING
BEFORE THE
SUBCOMMITTEE ON INTERNATIONAL FINANCE
OF THE
COMMITTEE ON
BANKING, HOUSING, AND URBAN AFFAIRS
UNITED STATES SENATE
NINETY-FIFTH CONGRESS
FIRST SESSION
ON
H.R. 7738
AN ACT WITH RESPECT TO THE POWERS OF THE PRESIDENT
IN TIME OF WAR OR NATIONAL EMERGENCY

SEPTEMBER 8, 1977

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Committee on Banking, Housing, and Urban Affairs



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AMENDING THE TRADING WITH THE ENEMY ACT

THURSDAY, SEPTEMBER 8, 1977

U.S. SENATE,
SUBCOMMITTEE ON INTERNATIONAL FINANCE,
COMMITTEE ON BANKING, HOUSING AND URBAN AFFAIRS,
Washington, D.C.

The subcommittee met at 9:21 a.m. in room 6226 of the Dirksen Senate Office Building, Senator Adlai Stevenson (chairman) presiding.

Senator STEVENSON. The committee will come to order.

This morning we take up the Trading With the Enemy Act revision, H.R. 7738.

Our first witness, who I am pleased to welcome this morning, is Dr. C. Fred Bergsten, Assistant Secretary of the Treasury for International Affairs.

STATEMENT OF C. FRED BERGSTEN, ASSISTANT SECRETARY OF THE TREASURY FOR INTERNATIONAL AFFAIRS

Dr. BERGSTEN. Thank you very much. I very much appreciate the opportunity personally to be back before your committee at this time in an official capacity today to testify on behalf of the administration to present your views on H.R. 7738, a bill with respect to the powers of the President in time of war or national emergency.

At the same time I shall comment on the amendments to that bill which you, Mr. Chairman, introduced on August 5, all of which the administration supports.

H.R. 7738, as you know, is the product of a cooperative effort between Congress and the administration in response to the requirements of the National Emergencies Act enacted a year ago. That act provided that powers exercised pursuant to existing states of national emergency would terminate within 2 years of the date of its enactment.

However, the National Emergencies Act exempted section 5(b) of the Trading With the Enemy Act and several other provisions from that 2-year termination requirement, in order to afford Congress the opportunity for deliberate consideration of section 5(b)'s powers and procedures.

We, in the administration, welcome this opportunity to review section 5(b) and are delighted to have worked so closely with the House in developing H.R. 7738.

The administration believes that the bill before you does respond effectively to the principal purpose of the National Emergencies Act: To place procedural restraints on any future exercise of national emergency powers by the President.

At the same time, we have worked with the Congress to assure that the bill satisfied modern needs for congressionally delegated Presidential emergency powers.

In short, Mr. Chairman, we feel that the President must have adequate emergency powers, but that such powers should be exercised within carefully constructed constraints and with the fullest possible congressional participation.

Our support of these reforms of use of emergency powers conferred by section 5(b) for many years stems from our recognition that the Congress has a fully legitimate role to play in the exercise of such extraordinary powers.

Furthermore, we are keenly aware in having reviewed the histories of this statute that on several occasions section 5(b) has been hurriedly broadened during moments of national crisis, such as the banking emergency in 1933 and World War II breakout in 1941, during which cases very little attention, frankly, was given to procedural safeguards consonant with the constitutional balance of power.

In contrast, the reforms of section 5(b) contained in H.R. 7738 will have had the benefit of calm deliberation which, to put it mildly, did not characterize all of the earlier amendments of this section.

Our support of the bill was qualified in only two respects, which I will comment on briefly, both of which are addressed by your own amendments to the bill.

Now, the bill would amend section 5(b) of the Trading With the Enemy Act by transferring nonwartime emergency powers to a new act entitled "The International Emergency Economic Powers Act."

This new act places the emergency powers previously available in section 5(b) under several procedural constraints in addition to those imposed by the National Emergencies Act itself.

For example, the President is authorized to continue to exercise section 5(b) powers invoked as of July 1 of this year upon the expiration in September 1978 of the 2-year period following the enactment of the National Emergencies Act for 1-year periods on the basis of the Presidential determination that each is in the national interest of the United States.

We do believe that it would be desirable to avoid possible complications from application of the new procedures specified in the International Emergency Economic Powers Act to existing section 5(b) activities, and hence, we support the approach in the bill to dealing with existing emergency actions.

In testimony before the House subcommittee, however, the administration supported a number of reforms in the manner in which section 5(b) powers are to be exercised in the future.

Both Assistant Secretary of State Katz and I testified in support of reforms designed to place certain procedural constraints on the President's exercise of section 5(b) powers and to assure that the Congress and the public were kept informed of the activities carried out under this section.

In addition, I proposed steps to avoid future emergency action which relied on unrelated national emergency declarations. We believe the bill before you today accomplishes all of these purposes.

We have only two objections to the present bill. The first relates to the language of section 203(b) which refers to uncompensated transfers, so-called.

The act already sets rather stringent standards for the exercise of its emergency powers in the first place.

Therefore, the administration believes that this additional limitation in section 203(b) is unnecessary.

In addition, we believe it is undesirable, because the exception could permit some dissipation of blocked assets through uncompensated transfers of them.

Accordingly, the administration urges the amendment introduced by you, Mr. Chairman, be adopted.

As you well know, your amendment would make three desirable changes. It would limit the exemption to U.S. persons and thus prevent nationals of blocked countries from making transfer out of blocked assets. It authorizes donations only of articles, not funds, increasing the likelihood that the donation would be used for the intended purpose.

And the President is authorized to withdraw the exemption where it would impair his ability to deal with the national emergency.

We think your amendment strikes a reasonable balance between the effectiveness of any future embargo controls that may be in the national interest and the private convictions of American citizens attempting to alleviate personal difficulties in those countries.

Our second objection is to the provisions of the bill which enable Congress to terminate a national emergency declared by the President and to disapprove of regulations issued pursuant to a national emergency by concurrent resolution.

In view of the numerous reporting requirements and other procedural constraints which are placed on the President's power under the act, we believe that the use of the concurrent resolution mechanism is unnecessary.

Furthermore, as is well known in the Congress, we believe that they violate constitutional principles of the separation of powers.

I do believe in this case where there is such extensive procedural constraint built into the act, in any event we can avoid the constitutional argument and simply deal with what is necessary in a pragmatic term.

On the constitutional point, however, I should note that the same considerations which motivate our support of procedural reform of section 5(b) require that we object to the use of concurrent resolutions in this manner. Hence, we particularly urge the committee to adopt the chairman's amendment No. 822 which would strike out the section 206 provision for congressional review and disapproval of regulations issued under the new act.

Finally, let me make two comments on the Export Administration Act which, of course, relates to the bill under consideration.

First, on section 301 of the bill which would provide authority to regulate exports extraterritorially under the Export Administration Act. The administration has already indicated in testimony before the House that it intends to apply any new extraterritorial control very sparingly.

I stated before the House subcommittee that we will weigh very carefully the foreign relations costs of extraterritorial extensions of any new measures pursuant to section 5(b) of the new act.

Accordingly, our support of this amendment should not be taken as any indication that the administration anticipates using these extraterritorial powers extensively.

Our support of section 301 simply reflects our belief that we should improve the administrative mechanism for applying such powers when they are necessary.

Finally, let me add that we believe it is of great importance that the Government's export control program continue over time without interruptions or lapse.

We would strongly prefer to avoid having to use the authorities under discussion today, previously available under section 5(b), for that purpose.

Accordingly, we would again urge that this legislation or other legislation passed by the Congress in the near future include a provision amending the Export Administration Act to make it permanent legislation which we propose in our original draft of this particular bill.

Mr. Chairman, thank you very much.

[Complete statement of Dr. Bergsten follows:]

STATEMENT OF C. FRED BERGSTEN, ASSISTANT SECRETARY FOR INTERNATIONAL AFFAIRS, DEPARTMENT OF THE TREASURY

Mr. Chairman and members of the International Finance Subcommittee, I appreciate this opportunity to testify on behalf of the Administration to present its views on H.R. 7738, a bill "With respect to the powers of the President in time of war or national emergency." I shall also comment on the amendments to that bill introduced by Senator Stevenson on August 5, 1977.

H.R. 7738 is the product of a cooperative effort between Congress and the Administration in response to the requirements of the National Emergencies Act enacted in the Fall of 1976. The Act provided that powers exercised pursuant to existing states of national emergency would terminate within two years of the date of its enactment. However, it exempted Section 5(b) of the Trading with the Enemy Act (and several other statutory provisions) from the two-year termination requirement to afford Congress opportunity for deliberate consideration of the Section's powers and procedures.

The Administration believes that H.R. 7738 responds to the principal purpose of the National Emergencies Act: to place procedural constraints on any future exercise of national emergency powers by the President. The Administration has also worked with Congress to insure that the bill satisfies modern needs for congressionally delegated Presidential emergency powers. Accordingly, we support H.R. 7738.

Our support of these reforms of the emergency powers conferred by section 5(b) stems from our recognition that the Congress has a legitimate role to play in the exercise of such extraordinary powers. Furthermore, we are keenly aware that, on several occasions, section 5(b) has been hurriedly broadened during moments of national crisis, in which little attention was given to procedural safeguards consonant with the constitutional balance of powers. In contrast, the reforms of Section 5(b) contained in H.R. 7738 will have the benefit of calm deliberation which did not characterize earlier amendments of the section. Our support of this bill is qualified in two respects which I will explain in the course of my comments.

The bill amends section 5(b) of the Trading with the Enemy Act by transferring the non-wartime emergency powers to a new act entitled the "International Emergency Economic Powers Act." This new act places the emergency powers previously available in section 5(b) under several procedural constraints in addition to those imposed by the National Emergencies Act. The President is

authorized to continue to exercise section 5(b) powers involved as of July 1, 1977, upon the expiration in September 1978, of the 2-year period following the enactment of the National Emergencies Act. These extensions, which are authorized for one-year periods, must be based on a Presidential determination that each is in the national interest of the United States. We believe that it would be desirable to avoid possible complications from application of the new procedures specified in the "International Emergency Economic Powers Act" to existing section 5(b) activities.

In testimony before the House Subcommittee on International Economic Policy and Trade, the Administration supported reforms in the manner in which Section 5(b) powers are exercised. Both Assistant Secretary of State Katz and I testified in support of reforms designed to place certain procedural constraints on the President's exercise of Section 5(b) powers, and to insure that the Congress and the public were kept informed of the activities carried out under this Section. In addition, I proposed steps to avoid future emergency actions which rely on unrelated national emergency declarations. We believe that the bill before you today accomplishes all of these purposes.

Nonetheless, we have two objections to this bill. The first objection relates to the language of Section 203(b), referring to uncompensated transfers. Since the Act already sets rather stringent standards for the exercise of its emergency powers, the Administration believes that this additional limitation is undesirable. In addition, the exemption could permit some dissipation of blocked assets through uncompensated transfers of blocked assets. Accordingly, the Administration urges that the amendment introduced to Senator Stevenson be adopted.

The Stevenson amendment would limit the exemption to U.S. persons and thus prevent nationals of a blocked country from making any donations or other transfers out of blocked assets. It authorizes donations of articles only, not funds, increasing the likelihood that the donation will be used for the intended purpose. Finally, the President is authorized to withdraw the exemption where it would impair his ability to deal with the national emergency. We think the Stevenson amendment strikes a reasonable balance between the effectiveness of any future embargo controls that may be in the national interest and the private convictions of American citizens.

We also object to the provisions of this bill which enable Congress to terminate a national emergency declared by the President, and to disapprove of regulations issued pursuant to a national emergency, by concurrent resolution. In view of the numerous reporting requirements and other procedural constraints which are placed on the President's power under the Act, we believe the use of concurrent resolution mechanisms is unnecessary. Furthermore, they violate constitutional principles of the separation of powers. The same constitutional considerations which motivate our support of procedural reforms of Section 5(b) require that we object to the use of concurrent resolutions in this manner. We particularly urge the committee to adopt Senator Stevenson's amendment which would strike out the Section 206 provision for congressional review and disapproval of regulations issued under the new Act.

Finally, Mr. Chairman, let me comment on Section 301 of the bill which amends the Export Administration Act of 1969 by providing the authority to regulate exports extraterritorially under that Act. This Administration has already indicated in its testimony before the House of Representatives that it intends to apply any new extraterritorial controls sparingly. I stated before the House Subcommittee on International Economic Policy and Trade that we will weigh very carefully the foreign relations costs of extraterritorial extensions of any new measures pursuant to Section 5(b) (or the new "International Emergency Economic Powers Act"). Accordingly, our support of this amendment of the Export Administration Act should not be taken as an indication that this Administration anticipates using these extraterritorial powers extensively. Our support of Section 301 simply reflects our belief that we should improve the administrative mechanism for applying such powers when they are necessary.

Finally, let me add that it is of great importance that the Government's export control program continue without interruption or lapse. We would strongly prefer to avoid having to use the authorities under discussion today for that purpose. Accordingly, the Administration urges that this legislative proposal include a provision amending the Export Administration Act to make it permanent legislation, as the Administration-supported draft recommends.

Senator STEVENSON. Thank you, Mr. Bergsten, for your helpful testimony, including the support of the amendments which have been introduced.

As I understand it, the authority under H.R. 7738 would be restricted to declared wars; is that correct?

Dr. BERGSTEN. The powers that would remain in the section 5(b) would only be applied in a situation where there was a declaration of war.

Senator STEVENSON. Yes.

Dr. BERGSTEN. Any broader national emergency would be in the new act.

Senator STEVENSON. Sticking with section 5(b), is it wise to so restrict the authority under that section or should it be broadened to other situations including, for example, hostilities pursuant to the War Powers Act?

Dr. BERGSTEN. This was a discussion that we also had during consideration in the House, and I indicated that the administration would have no objection to such a broadening.

We feel that that kind of situation could be handled under the legislation as proposed, but we certainly would have no objection to a broadening of the type you suggest.

Senator STEVENSON. Nothing in this bill would affect the claims of U.S. nationals for assets that have been expropriated?

In other words, it is not the intention to affect existing adjudicated claims for foreign assets that have been expropriated?

Dr. BERGSTEN. That is right. There are several sets of provisions in the bill which would maintain the authority of the President to keep those assets under control pending eventual negotiated settlement of the issue involved.

Senator STEVENSON. Now, as you pointed out, there are two exemptions. One is for communications not involving a transfer of anything of value. These are in section 203(b).

The other is uncompensated transfers of anything of value. That is to say, gifts and donations. Some concern has been expressed about possible restrictions on transfers of gifts for the personal welfare of individuals abroad, as opposed to other transfers that might affect the national welfare of a foreign country. Would there be any intention on the part of the administration to use this authority to restrict, for example, gifts of money to relatives abroad or gifts of medicines or other humanitarian gifts?

Dr. BERGSTEN. Certainly no intention to restrict gifts for humanitarian purposes, such as food, et cetera.

There is always a question of actual transfers of cash as to what the end use is going to be.

That is why we thought that your amendment, which would limit it to American nationals and to particular kinds of transfers, would be an improvement over the language as it now exists in the current bill.

Certainly, there is no intention to impede transfers for clearly humanitarian purposes.

What we simply think is desirable is to define that as clearly as is possible in the legislation, recognizing that one cannot pin it down in total precision in any statutory language.

Senator STEVENSON. Now, you have also indicated the administration's opposition to the authority of the Congress to disapprove a regulation or some part of a regulation. That is contained in the House bill. Could you enlarge upon that opposition for the record?

How would that, for example, complicate the administration of these controls in a state of emergency?

Dr. BERGSTEN. Well, our concern about it has three different facets. One is a purely pragmatic concern. Under the authority—or under the override authority now in the bill, the President would issue a national emergency declaration and take some action under that national emergency declaration, but the Congress would have the right to override in a period of 30 days.

We feel that from a purely pragmatic standpoint, this would open up a great period of uncertainty during those 30 days.

We are talking by definition about emergency situations, where, to put it mildly, things might be highly uncertain and volatile.

If there was a question as to whether the action taken by the President were actually going to be in effect beyond the 30 days, we feel that it would have a very serious adverse effect in terms of compliance with the President's action and, therefore, achieving its purpose. That is on the pragmatic side.

In terms of a more fundamental question of whether there is adequate congressional participation in the process, it is our feeling that the other procedural constraints built into the act provide such participation.

The act would require the President to consult as fully as possible with the Congress before he ever implemented any new national emergency statute under it.

It would provide for semiannual reviews and reports to the Congress and the public on what was going on.

It would require the President annually to state that the national emergency continued and that the actions taken under it had to continue.

So, at every state of the process, as we would see it, there is procedure for close consultation with the Congress, public awareness of what is going on, and, therefore, a major constraint on the President taking excessive action which we share your view would be highly undesirable.

The third consideration is the traditional constitutional point that the executive branch has taken—and we take in this case—that congressional disapproval by a concurrent resolution as proposed here does not conform with the constitutional requirements.

Congress, of course, can always pass a law which would override the President's action, and if one wants an ultimate opportunity for congressional disapproval, that, of course, is always available.

It is really on those three different grounds that we feel that the utility of a concurrent resolution really should be rejected in this case.

Senator STEVENSON. I have no additional questions. I think this action is long overdue.

I appreciate your support for those amendments. I agree with your comments and am hopeful that we can obtain favorable action on the act and the amendments in the very near future.

Then we might be able to obtain the concurrence of the House.

Thank you very much, Mr. Bergsten. We will follow up as quickly as we can.

Dr. BERGSTEN. Thank you very much.

Senator STEVENSON. The next witness is David J. Steinberg of the United States Council for An Open World Economy.

STATEMENT OF DAVID J. STEINBERG, PRESIDENT, UNITED STATES COUNCIL FOR AN OPEN WORLD ECONOMY, WASHINGTON, D.C.

Mr. STEINBERG. Good morning, Mr. Chairman.

Senator STEVENSON. Good morning.

Mr. STEINBERG. Mr. Chairman, I have long been concerned over the great ease with which many administrations have used section 5(b) of the Trading with the Enemy Act for a wide range of extraordinary controls never contemplated in the enactment of that legislation and for which the President has not been held accountable to anyone.

I believe that long overdue is legislation to limit the Trading with the Enemy Act to situations where there is indeed an enemy, the subject of formal declaration of war.

And long overdue is legislation to limit with suitable standards and suitable procedures for Presidential accountability, recourse to emergency economic powers in national emergencies short of war. I believe and the council believes that H.R. 7738 is the long awaited answer to these needs. I take no exception to the three amendments proposed by you, Mr. Chairman.

I must admit on two of them, 821 and 823, I have no expert knowledge of the substance of those matters.

So I can give no help to your committee in that respect.

The other amendment originally caused me some concern in view of my very strong views about the need for adequate Presidential accountability. This amendment concerns the override authority.

If this override authority were to remain in the bill, I would want to see some standards added to prevent arbitrary congressional action. However, I can see a constitutional basis for deleting such override authority. I believe there is persuasive opinion that such overrides do raise serious questions of constitutionality.

Retention of the override authority seems unnecessary in any case, in view of the various provisions for congressional review and the Presidential accountability regarding national emergencies declared under this new legislation.

I believe there is enough in these dynamics of congressional power and Presidential accountability in the new legislation to assure adequate Presidential attention to congressional sensibilities on the propriety of specific regulations promulgated under these powers. I, therefore, concur completely with the views of Secretary Bergsten on this matter.

In conclusion, may I say that the provisions concerning Presidential accountability should, however, be expanded somewhat, first to require, if at all possible, not just regular consultation with the Congress, which I believe is a very imprecise requirement, but consultation, perhaps, with the chairmen of the committees of jurisdiction and,

second, to require the President's semiannual report and the consultation itself to include updating on the need and effectiveness of the emergency action and on the steps being taken to resolve the emergency under which the action was taken.

That, Mr. Chairman, concludes a very brief summary of an already very brief statement.

[Complete statement follows:]

TESTIMONY OF DAVID J. STEINBERG, PRESIDENT, UNITED STATES COUNCIL FOR AN OPEN WORLD ECONOMY

Long overdue is legislation to limit the Trading with the Enemy Act to situations where there is indeed an enemy, the subject of a formal declaration of war. And long overdue is legislation to limit with suitable standards, and suitable procedures for Presidential accountability, recourse to emergency economic powers in national emergencies short of war. Section 5(b) of the Trading with the Enemy Act has for too long provided a major resource for that power preserve from which many administrations have with great ease fished out statutory authority for a wide range of extraordinary controls never contemplated in the enactment of that legislation and for which the President has not been held accountable to anyone.

H.R. 7738, passed by the House and now awaiting Senate action, is on the whole a worthy answer to these needs. Its application of the National Emergencies Act to Presidential declarations of national emergency during peacetime as a basis for special controls over international transactions is well-founded. The "grandfathering" of existing uses of 5(b), but for a limited period and subject to brief extensions by the President and to review by Congress, seems practical.

I take no exception to the three amendments proposed by Senator Stevenson. The one that originally caused me some concern would delete the bill's provision for Congressional override of any Presidential regulation (in whole or in part) under the reconstituted emergency authority over international transactions in peacetime. If this override authority were to remain in the bill, I would want to see some standards added to prevent arbitrary Congressional action. However, I can see a constitutional basis for deleting such override authority.

There is persuasive opinion that such overrides are unconstitutional, or at least raise serious questions of constitutionality. Retention of such authority to override does not seem worth the great uncertainty, and the real possibility of court action, that would hover over such Congressional action against certain uses of these emergency powers. Retention of this authority seems unnecessary in any case in view of the fact that (a) the national emergency under which the particular regulations are issued must be reconsidered by Congress every six months and may be terminated by concurrent resolution at any time, (b) the President is required to consult with Congress regularly so long as he is invoking these emergency powers, (c) the President is required to explain fully to Congress his reasons for invoking such powers, and (d) the President is required to report to Congress at least once every six months on the actions he has taken and on any changes in the basis for his decision to utilize these powers. There is enough in these dynamics of Congressional power and Presidential accountability to ensure adequate Presidential attention to Congressional sensibilities on the propriety of specific regulations promulgated under these powers.

The provisions concerning Presidential accountability should, however, be expanded (a) to require, not just regular consultation with Congress (a very imprecise requirement), but consultation with the chairmen of the committees of jurisdiction, and (b) to require the President's semiannual report, and the consultation itself, to include updating on the need and effectiveness of the emergency action, and on the steps being taken to resolve the emergency under which the action was taken.

I urge earliest Senate action on this important piece of legislation. The national interest demands it. The virtual silence of the business community of the need for such reform, despite the adverse effects which use of 5(b) in recent years has had on so many corporations, indicates inadequate business attention to both the national-interest and the business-interest imperatives of such legislation.

Senator STEVENSON. Thank you, Mr. Steinberg.

I have some reservations about that suggestion for a requirement of consultation with the chairmen of the committees of jurisdiction.

The nonchairmen of those committees of jurisdiction sometimes have reservations about restricting consultations to just the chairman. Besides, it is not very clear what the committees of jurisdiction are, but I think that is a useful suggestion.

Maybe the requirement with respect to the President's semiannual report should be made more specific and require that the periodic updating address itself to the need and effectiveness of the emergency action.

I think we ought to consider that.

Mr. STEINBERG. I have no strong feelings regarding my suggestion of consultation. I myself have reservations about the suggestion I made.

The reason I made the suggestion was that just to require in the bill that the President consult with the Congress seems theoretically to mean he could choose a few Members of Congress who are particularly responsive to his desires and then say he consulted with the Congress.

What does consultation mean?

I was just sort of groping for some degree of specificity, but I don't feel strongly about my suggestion because I realize that it may not be feasible at all to write that kind of specificity into an act of Congress.

Senator STEVENSON. Well, that is the difficulty. I certainly don't mean to imply any lack of confidence on the part of Members in chairmen. We ran into a very similar situation recently in which such specificity was attempted. It got so specific finally as to be quite unworkable.

As a matter of fact, I think we will probably end up less specific than we should be.

I am hopeful that we can, as I indicated to Mr. Bergsten, move rapidly on this legislation.

There doesn't appear to be opposition to it.

At least, if there is, I am unaware of it.

Mr. STEINBERG. I am rather surprised, Mr. Chairman, that there has not been more interest in this reform from the business community.

Maybe certain marginal areas of the community, but I don't sense any real business interest in this issue.

I am rather surprised. Many corporations have been adversely affected in many ways by the use of 5(b). I need not elaborate on that.

Senator STEVENSON. I think you are right. I was checking with the staff. We have received very little reaction from the business community. Such interest as has been expressed has been on the behalf of persons with claims for expropriated assets. Beyond that, nothing. I was a member of the committee which recommended the termination of all the emergency powers of the President a couple of years ago. I was trying to remember why we didn't include these powers. It is an interesting sidelight.

Having granted the President sweeping emergency powers, we couldn't repeal them without the consent of the President. Any legislation, of course, was subject to a veto.

We only included such powers as he was willing to relinquish.

I guess when we came to this one, that President was unwilling to relinquish it.

I am quite certain we attempted to take care of this situation then. That President was President Nixon.

Now, as Mr. Bergsten indicated, we have a different President. Perhaps for the first time—I don't know what President Ford's attitude was—we have an opportunity to get this job done.

Well, we will proceed with it as rapidly as we can.

I thank you once more, Mr. Steinberg.

Senator STEVENSON. The markup of this bill is scheduled for next Thursday the 15th.

With that, the subcommittee is adjourned.

[Whereupon, at 9:50 a.m., the hearing was adjourned.]

[Copy of H.R. 7738, the amendments thereto, and an additional communication follow:]

H.R. 7738

AN ACT With respect to the powers of the President in time of war or national emergency.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—AMENDMENTS TO THE TRADING WITH THE ENEMY ACT

REMOVAL OF NATIONAL EMERGENCY POWERS UNDER THE TRADING WITH THE ENEMY ACT

SEC. 101. (a) Section 5(b) (1) of the Trading With the Enemy Act is amended by striking out "or during any other period of national emergency declared by the President" in the text preceding subparagraph (A).

(b) Notwithstanding the amendment made by subsection (a), the authorities conferred upon the President by section 5(b) of the Trading With the Enemy Act, which were being exercised with respect to a country on July 1, 1977, as a result of a national emergency declared by the President before such date, may continue to be exercised with respect to such country, except that, unless extended, the exercise of such authorities shall terminate (subject to the savings provisions of the second sentence of section 101(a) of the National Emergencies Act) at the end of the two-year period beginning on the date of enactment of the National Emergencies Act. The President may extend the exercise of such authorities for one-year periods upon a determination for each such extension that the exercise of such authorities with respect to such country for another year is in the national interest of the United States.

(c) Paragraph (1) of section 502(a) of the National Emergencies Act is repealed.

WARTIME AUTHORITIES

SEC. 102. Section 5(b) (1) of the Trading With the Enemy Act is amended—

(1) in the text preceding subparagraph (A), by striking out "or otherwise," the first time it appears; and

(2) by striking out "; and the President may, in the manner hereinabove provided, take other or further measures not inconsistent herewith for the enforcement of this subdivision".

CRIMINAL PENALTIES

SEC. 103. (a) Section 16 of the Trading With the Enemy Act is amended by striking out "\$10,000" and inserting in lieu thereof "\$50,000".

(b) Section 5(d) (3) of such Act is amended by striking out the second sentence.

TITLE II—INTERNATIONAL EMERGENCY ECONOMIC POWERS

SHORT TITLE

SEC. 201. This title may be cited as the "International Emergency Economic Powers Act".

SITUATIONS IN WHICH AUTHORITIES MAY BE EXERCISED

SEC. 202. (a) Any authority granted to the President by section 203 may be exercised to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat.

(b) The authorities granted to the President by section 203 may only be exercised to deal with an unusual and extraordinary threat with respect to which a national emergency has been declared for purposes of this title and may not be exercised for any other purpose. Any exercise of such authorities to deal with any new threat shall be based on a new declaration of national emergency which must be with respect to such threat.

GRANT OF AUTHORITIES

SEC. 203. (a) (1) At the times and to the extent specified in section 202, the President may, under such regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit—

(i) any transactions in foreign exchange,

(ii) transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof,

(iii) the importing or exporting of currency or securities; and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest; by any person, or with respect to any property, subject to the jurisdiction of the United States.

(2) In exercising the authorities granted by paragraph (1), the President may require any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, complete information relative to any act or transaction referred to in paragraph (1) either before, during, or after the completion thereof, or relative to any interest in foreign property, or relative to any property in which any foreign country or any national thereof has or has had any interest, or as may be otherwise necessary to enforce the provisions of such paragraph. In any case in which a report by a person could be required under this paragraph, the President may require the production of any books of account, records, contracts, letters, memoranda, or other papers, in the custody or control of such person.

(3) Compliance with any regulation, instruction, or direction issued under this title shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same. No person shall be held liable in any court for or with respect to anything done or omitted in good faith in connection with the administration of, or pursuant to and in reliance on, this title, of any regulation, instruction, or direction issued under this title.

(b) The authority granted to the President by this section does not include the authority to regulate or prohibit, directly or indirectly—

(1) any postal, telegraphic, telephonic, or other personal communication, which does not involve a transfer of anything of value; or

(2) uncompensated transfers of anything of value except to the extent that the President determines that such transfers (A) would seriously impair his ability to deal with the unusual and extraordinary threat which is the basis for the exercise of authorities under this title, (B) are in response to coercion against the proposed recipient or donor, or (C) would endanger Armed Forces of the United States which are engaged in hostilities or are in a situation where imminent involvement in hostilities is clearly indicated by the circumstances.

CONSULTATION AND REPORTS

SEC. 204. (a) The President, in every possible instance, shall consult with the Congress before exercising any of the authorities granted by this title and shall consult regularly with the Congress so long as such authorities are exercised.

(b) Whenever the President exercises any of the authorities granted by this title, he shall immediately transmit to the Congress a report specifying—

- (1) the circumstances which necessitate such exercise of authority;
- (2) why the President believes those circumstances constitute an unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States;
- (3) the authorities to be exercised and the actions to be taken in the exercise of those authorities to deal with those circumstances;
- (4) why the President believes such actions are necessary to deal with with those circumstances; and
- (5) any foreign countries with respect to which such actions are to be taken and why such actions are to be taken with respect to those countries.

(c) At least once during each succeeding six-month period after transmitting a report pursuant to subsection (b) with respect to an exercise of authorities under this title, the President shall report to the Congress with respect to the actions taken, since the last report, in the exercise of such authorities, and with respect to any changes which have occurred concerning any information previously furnished pursuant to paragraphs (1) through (5) of subsection (b).

(d) The requirements of this section are supplemental to those contained in title IV of the National Emergencies Act.

AUTHORITY TO ISSUE REGULATIONS

SEC. 205. The President may issue such regulations, including regulations prescribing definitions, as may be necessary for the exercise of the authorities granted by this title.

CONGRESSIONAL REVIEW OF REGULATIONS

SEC. 206. (a) Any regulation issued under this title (including any modification of a previously issued regulation) shall be reported to the Congress not later than the date on which it becomes effective.

(b) (1) If, within the period described in paragraph (2), the Congress adopts a concurrent resolution disapproving, in whole or in part, a regulation reported pursuant to subsection (a), then such regulation shall immediately cease to be effective to the extent it is disapproved.

(2) The period referred to in paragraph (1) is the thirty-day period (excluding any day on which either House of Congress is not in session) beginning on the date on which the regulation is reported to the Congress pursuant to subsection (a).

(c) Disapproval of a regulation by the Congress under subsection (b) shall not affect the validity of such regulation (or any action taken under such regulation) during the period it was in effect.

PENALTIES

SEC. 207. (a) A civil penalty of not to exceed \$10,000 may be imposed on any person who violates any license, order, or regulation issued under this title.

(b) Whoever willfully violates any license, order, or regulation issued under this title shall, upon conviction, be fined not more than \$50,000, or, if a natural person, may be imprisoned for not more than ten years, or both; and any officer, director, or agent of any corporation who knowingly participates in such violation may be punished by a like fine, imprisonment, or both.

SAVINGS PROVISION

SEC. 208. (a) (1) Except as provided in subsection (b), notwithstanding the termination pursuant to the National Emergencies Act of a national emergency declared for purposes of this title, any authorities granted by this title, which are exercised on the date of such termination on the basis of such national emergency to prohibit transactions involving property in which a foreign country or national thereof has any interest, may continue to be so exercised to prohibit transactions involving that property if the President determines that the continuation of such prohibition with respect to that property is necessary on account of claims involving such country or its nationals.

(2) Notwithstanding the termination of the authorities described in section 101(b) of this Act, any such authorities, which are exercised with respect to a country on the date of such termination to prohibit transactions involving any property in which such country or any national thereof has any interest, may continue to be exercised to prohibit transactions involving that property if the President determines that the continuation of such prohibition with respect to the property is necessary on account of claims involving such country or its nationals.

(b) The authorities described in subsection (a)(1) may not continue to be exercised under this section if the national emergency is terminated by the Congress by concurrent resolution pursuant to section 202 of the National Emergencies Act and if the Congress specifies in such concurrent resolution that such authorities may not continue to be exercised under this section.

(c) (1) The provisions of this section are supplemental to the savings provisions of paragraphs (1), (2), and (3) of section 101(a) and of paragraphs (A), (B), and (C) of section 202(a) of the National Emergencies Act.

(2) The provisions of this section supersede the termination provisions of section 101(a) and of title II of the National Emergencies Act to the extent that the provisions of this section are inconsistent with these provisions.

(d) If the President uses the authority of this section to continue prohibitions on transactions involving foreign property interests, he shall report to the Congress every six months on the use of such authority.

TITLE III—AMENDMENTS TO THE EXPORT ADMINISTRATION ACT OF 1969

AUTHORITY TO REGULATE EXTRATERRITORIAL EXPORTS

SEC. 301. (a) The first sentence of section 4(b)(1) of the Export Administration Act of 1969 is amended to read as follows: "To effectuate the policies set forth in section 3 of this Act, the President may prohibit or curtail the exportation, except under such rules and regulations as he shall prescribe, of any articles, materials, or supplies, including technical data or any other information, subject to the jurisdiction of the United States or exported by any person subject to the jurisdiction of the United States."

(b) (1) Section 4(b)(2)(B) of such Act is amended—

(A) in the first sentence, by striking out "from the United States, its territories and possessions,"; and

(B) in the second sentence—

(i) by striking out "from the United States"; and

(ii) by striking out "produced in the United States" and inserting in lieu thereof "which would be subject to such controls".

(2) Section 6(c)(2)(A) of such Act is amended by striking out "from the United States, its territories or possessions."

Passed the House of Representatives July 12, 1977.

Attest:

EDMUND L. HENSHAW, Jr., *Clerk.*

[H.R. 7738, 95th Cong., 1st sess.]

AMENDMENT Intended to be proposed by Mr. Stevenson to H.R. 7738, an Act with respect to the powers of the President in time of war or national emergency, viz:

In section 203(b)(2) on page 6 at line 9, strike the word "uncompensated" and all that follows thereafter through and including the word "title" on line 14 and insert in lieu thereof: "donations, by persons subject to the jurisdiction of the United States, of articles, including food, clothing, and medicine, intended to be used solely to relieve human suffering, except to the extent that the President determines that such donations (A) would seriously impair his authority to deal with any national emergency declared under section 202 of this title,".

Amdt. No. 821

[H.R. 7738, 95th Cong., 1st sess.]

AMENDMENT Intended to be proposed by Mr. Stevenson to H.R. 7738, an Act with respect to the powers of the President in time of war or national emergency, viz:

Strike section 206 on pages 8 and 9 in its entirety and renumbered section 207 and section 208 as section 206 and section 207, respectively:

Amdt. No. 822

★(Star Print)

[H.R. 7738, 95th Cong., 1st sess.]

AMENDMENT Intended to be proposed by Mr. Stevenson to H.R. 7738, an Act with respect to the powers of the President in time of war or national emergency, viz: Insert on page 11 immediately after line 6 a new section numbered 208 as follows:

SEC. 208. If any provision of this Act is held invalid, the remainder of the Act shall not be affected thereby.

Amdt. No. 823

SHANGHAI POWER CO.,
Boise, Idaho, August 30, 1977.

HON. ADLAI STEVENSON,
Chairman, Subcommittee on International Finance, Dirksen Office Building,
Washington, D.C.

DEAR SENATOR STEVENSON: As the holder of the largest adjudicated claim against the People's Republic of China under section 502(1)(B) of the International Claims Settlement Act of 1949, the Shanghai Power Company is keenly interested in H.R. 7738 which, having passed the House of Representatives, is now before the Senate and your subcommittee for consideration. As President of Shanghai Power Company, I presented my views in a statement filed with the Subcommittee on International Economic Policy and Trade of the House Committee on International Relations at the time this measure was before that body.

We have considered the three amendments which you intend to propose to H.R. 7738, as introduced in the Senate on August 5, 1977. We favor the limitation of transfers proposed in Amendment No. 821. We also favor Amendments No. 822 and 823. Your three amendments would, in our opinion, improve and strengthen H.R. 7738.

The enclosed statement sets forth the views of Shanghai Power Company as to the importance of the emergency powers of the President under section 5(b) of the Trading With the Enemy Act in protecting the interests of U.S. nationals who have adjudicated claims against foreign countries for assets that have been expropriated. Amendments to section 5(b) should state clearly that the existing foreign assets controls are to continue on the basis of the President's national emergency declarations. They should also confirm the authority of the President to place such emergency controls in effect in the future and to maintain them as long as the national interest may require.

I respectfully request that the enclosed statement be included in your printed record of hearings.

Sincerely yours,

JOHN E. CLUTE, *President.*

STATEMENT OF JOHN E. CLUTE, PRESIDENT OF SHANGHAI POWER CO.

This statement is submitted on behalf of Shanghai Power Company, a Delaware corporation which qualifies as a "national of the United States" under Section 502(1)(B) of the International Claims Settlement Act of 1949, as amended (22 U.S.C. §§ 1643-1643k, Supp. II). The Company holds the largest adjudicated claim of a U.S. national against the People's Republic of China under that Act.

Our specific concern with respect to the repeal or modification of Section 5(b) of the Trading With the Enemy Act is the possibility that such an action might delay or even seriously prejudice the settlement of all American claims against China. This could be the result if Section 5(b) were repealed or if it were modified without due regard for the interests of the American claimants.

In a more general sense we believe it is essential that Section 5(b), or its functional equivalent, be preserved so that there will be no doubt that the Executive and Legislative branches share the conviction that our Government must be able in the future to act in the international economic sphere promptly and decisively to protect the interests of the country and of its nationals in those unusual situations that require this type of action.

Shanghai Power Company was probably the largest single industrial enterprise in China in 1950, and it is proud of the contribution that it made to the development of the Chinese economy both before and after World War II.¹ Its claim against the People's Republic of China is based on the seizure of its

¹ See "Encyclopedia Britannica," Vol. 20, P. 346 (1971 ed.); Zumwalt, "On Watch," p. 16 (New York Times Book Co., Inc., 1976).

properties in China by that Government in 1950 without offer or payment of any compensation. The loss suffered by the Company has been certified by the Foreign Claims Settlement Commission of the United States at \$53,832,885 plus interest at 6% per annum from December 28, 1950, to the date of settlement.

In addition, a subsidiary of Shanghai Power Company named Western District Power Company of Shanghai Federal Inc. U.S.A. ("Western District Power Company"), a China Trade Act corporation, likewise had its properties seized by the People's Republic of China in December 1950. The Foreign Claims Settlement Commission of the United States has certified the loss of Western District Power Company at \$1,758,684 plus interest at the rate of 6% per annum from December 28, 1950, to the date of settlement. Thus, the properties of these two American companies seized by the People's Republic of China had a total value of \$55,591,569. Taking into account the fact that this amount is expressed in 1950 dollars, and considering the severe decline in the purchasing power of the dollar, it is evident that this figure does not come close to reflecting the real economic loss suffered by Shanghai Power Company. Even if Shanghai Power Company were paid some \$90 million of interest to date in accordance with the decision of the Foreign Claims Settlement Commission (for a total in excess of \$145 million), this would not wholly offset the companies' losses.

For many years the hostility between the Governments of the United States and the People's Republic of China precluded any discussions with respect to the settlement of the American claims. In recent years the claims have been recognized as one of the principal items that will require solution before full resumption of normal ties between the two countries can be achieved, including full diplomatic representation and the resumption of trade and commercial relations without the overhanging threat of litigation. There have been reports from time to time that serious discussions of the claims have taken place between representatives of the two nations since 1973.

We understand that the key to a possible settlement is the fact that there is in the United States a total of, perhaps, \$80 million of Chinese assets that are blocked under the Foreign Assets Control Regulations (31 CFR Part 500) and that the settlement talks contemplate that the People's Republic of China will assign those blocked assets to the United States for application toward the payment of the American claims against the People's Republic of China totaling about \$197 million exclusive of interest since 1950. If such a settlement were reached and if no further payment were made by the People's Republic of China on account of the American claims, the American claimants would receive some 40 cents on the dollar of their losses (exclusive of interest and of any adjustment for depreciation of the dollar). Such compensation could hardly be characterized as either prompt or adequate but it would at least be something more than purely nominal.

The blockage of the Chinese assets rests squarely upon the statutory foundation of Section 5(b) of the Trading with the Enemy Act, which has been on the statute books (though modified from time to time) for approximately 60 years. Its precursors date back to an Act of Congress of July 13, 1861, and the 1861 Act itself was grounded upon the common law of both England and the United States.

Section 5(b) is operative during "the time of war or during any other period of national emergency declared by the President. . . ." When the National Emergencies Act (Public Law 94-412) was adopted by the Congress in 1976, it was recognized that Section 5(b) of the Trading with the Enemy Act was of a particular importance that required its exemption from those provisions of the National Emergencies Act terminating the powers and authorities possessed by the Executive Branch as a result of a declaration of national emergency. We believe that this was and continues to be a correct perception and that Section 5(b) should remain in effect with only such changes, if any, as are necessary to satisfy the Congress that the Executive will review periodically the advisability of continuing in effect measures founded upon emergency conditions. In reality there is nothing to take the place of Section 5(b) except for the broad constitutional powers of the President in respect of the foreign relations of the United States. Its invocation by the President has on a number of occasions been supported by the Congress such as its enactment of Titles II and IV of the International Claims Settlement Act of 1949 involving the vesting of the properties of Hungary, Rumania, Bulgaria, and Czechoslovakia. These actions served well the interests of this nation, and the measures taken by the Executive and

Legislative Branches have consistently been upheld by the Courts against legal challenge.²

It is hoped that the Congress will give serious consideration to the possible effects that revisions to Section 5(b) might have upon existing foreign asset controls as well as such controls as may be called for in the future. During the Subcommittee's hearings several authorities have stated that they are uncertain as to whether the United States Government's blockages of foreign assets now in effect (e.g., China, Cuba, Czechoslovakia, and Viet Nam) could, as a legal matter, be maintained in the face of a Congressional declaration that the national emergencies that gave rise to such blockages no longer exist for the purposes of Section 5(b). For example, reference was made to the opinion of Judge Leventhal in *Nielsen v. Secretary of the Treasury*, 424 F. 2d 833 (1970) which indicates that the Presidential national emergency proclamation was regarded by the United States Court of Appeals as an important element sustaining the constitutionality of the freezing of assets within the United States belonging to foreign nationals.

Assuming that in the text of any legislation modifying or replacing Section 5(b) and in the legislative history of any such modification Congress would express its clear intent that blocked assets are not to be released by virtue of the modification, the likelihood of such release occurring as an unintentional consequence of the legislation is remote. Even so, there is some danger that in its desire to clear away what some regard as stale national emergencies, the Congress could by inadvertence open the door to a legal challenge of the continuance of foreign asset controls. Such a result could occur, for example, if the Congress were to recast the legislation in the form of a nonemergency statute. The consequences would be most unfortunate and would include:

- (a) the disruption of claims settlement negotiations between the United States Government and governments that have confiscated American property;
- (b) the prolongation of American claims as a barrier to normal commercial relations between the United States and the countries concerned;
- (c) litigation that, to the detriment of the American claimants and the U.S. taxpayer, could clog the dockets of trial and appellate courts in the United States for years to come;
- (d) frustration of the legitimate expectation of American nationals that the United States Government, including the Congress, will act in such a manner as to protect American interests to the fullest extent possible; and
- (e) weakening of the position of the U.S. Government that governments have an international obligation to pay prompt, adequate, and effective compensation for the taking of foreign owned property.

If, as we believe, the legal and political arguments are compelling in favor of preserving the authority found in Section 5(b) as to the blocking of foreign assets, the practical arguments are overwhelming. The likelihood of a settlement of the claims of United States nationals against the People's Republic of China with the consequent removal of a serious impediment to normal relations between the two countries is greatly enhanced by the retention of the blocked Chinese assets. This is not simply a question of leverage; it is a matter of carrying to its logical conclusion the action taken by the United States Government in 1950 with precisely this possibility in mind. If, on the other hand, the blocked assets were to be released, the result could be a greatly reduced desire on the part of the People's Republic of China to settle the claims, protracted litigation, and the perpetuation of an international irritant in a most exacerbated form.

Shanghai Power Company and Western District Power Company oppose the repeal or emasculatation of Section 5(b) of the Trading With the Enemy Act. If amendments to Section 5(b) are proposed, they should state clearly that the existing foreign asset controls are to continue on the basis of the President's national emergency declarations. They should also confirm the authority of the President to place such emergency controls in effect in the future and to maintain them as long as the national interest may require.

² For example, in an opinion rejecting an attack upon the blocking of foreign assets pursuant to Section 5(b) Judge Friendly, speaking for a unanimous Court, said: "The unquestioned right of a state to protect its nationals in their persons and property while in a foreign country, see 1 Oppenheim, *International Law*, § 319, at 686-87 (8th Ed. Lauterpacht 1955), must permit initial seizure and ultimate expropriation of assets of nationals of that country in its own territory if other methods of securing compensation for its nationals should fail."— (*Sardino v. Federal Reserve Bank of New York*, 361 F. 2d 106, 113 (2d CCA 1966)).